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# Supreme Court of the United States

OCTOBER TERM, 1933—No. 9

CULLEN FUEL COMPANY, INC., owner of the deck scow "CULLEN No. 32,"
*Petitioner,*

against

W. E. HEDGER CO., INC., bailee of the cargo,
*Respondent.*

## BRIEF ON BEHALF OF THE RESPONDENT

### Statement.

This case comes before this Court pursuant to a writ of certiorari granted herein to review the decision of the Circuit Court of Appeals for the Second Circuit. That decision denied petitioner limitation of its liability as owner of the scow *Cullen No. 32* for a cargo loss caused by the capsizing of the scow in New York Harbor on August 12, 1925. The opinion of the Circuit Court of Appeals is reported at 62 Fed. (2) 68, and the opinion of the District Court at 45 Fed. (2) 859.

### Facts.

In August, 1925, the S. S. *Berk* arrived at New York with a cargo of barytes ore consigned to Grasselli Chemical Company. The *Berk* tied up at the foot of Roosevelt Street, New York City, and the Grasselli Chemical Company employed W. E. Hedger Co., Inc., respondent herein, to transport the ore from the *Berk* to Grasselli, N. J. (Pierce, 109).

On August 11, 1925, Hedger chartered, among others, the scow *No. 32* for the transportation of the ore to Grasselli. The charter was an oral one made over the telephone by S. W. Pierce, Vice-President of W. E. Hedger Co., Inc., and E. D. Sweet, Marine Superintendent of Cullen Fuel Company, Inc. (Sweet, 16-17; Pierce, 109-110).

Petitioner was then informed of the use to which the scow would be put while under charter (Pierce, 111).

Before the scow went under charter to Hedger, Sweet, the Marine Superintendent of the owner, purported to examine her to see if she was seaworthy. In that examination he went down in her hold, while she was lying light, and "looked at her deck beams" and her sides "to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 22). Finding no broken planks or any visible leaks, the scow was delivered to the charterer.

While the scow was in the process of loading the ore, she capsized and spilled her entire cargo and both Courts below concurred in finding that the sinking was caused by unseaworthiness of the scow existing at the time that she was delivered under charter.

## POINTS

### I.

**The Court correctly denied limitation of liability to petitioner because of the breach of the warranty of seaworthiness which arose from petitioner's personal contract of charter.**

**1. The contract of charter was the personal contract of the petitioner.**

There has never been any question as to Sweet's authority, as Marine Superintendent of petitioner, to enter into this

contract of charter so as validly to bind petitioner to the terms thereof. The petition for limitation of liability alleges that a valid charter was entered into between petitioner and respondent (Record, p. 2), and at page 41 of petitioner's brief, Sweet's authority to make the charter is reiterated. Petitioner there says, "No question is raised as to his (Sweet's) authority to make the contract."

Since Sweet was admittedly authorized to make the charter contract, surely petitioner cannot seriously argue that this charter, made by one with proper authority, is not "personal" to it. A corporation can act, of course, only through agents and representatives, and if the corporation gives its Marine Superintendent authority to charter its boats, the charters so entered into are exactly the same as though made by the president or any other officer having authority to charter the boats. It was not shown here whether it was the duty of any other officer than Sweet to handle the chartering work, and for all that the record discloses, Sweet was the only person connected with petitioner whose duties would include entering into contracts of charter on petitioner's behalf.

The test as to whether the contract made by Sweet was "personal" to the corporation is not the *title* under which he acts but rather the *authority* he has to bind the corporation. This was aptly stated by the Circuit Court of Appeals for the Second Circuit in *Proctor & Gamble* v. *Atlantic Oil Trans Co.*, 65 F. (2) 589 (1933). There Judge MANTON said:

> "The purpose of the limitation of liability statute was to exempt owners, beyond the value of the vessel and freight due, from the consequences of the acts, contractual or tortious, of the master, crew, or agent regulating the vessel beyond the control or supervision of the owner. The contracts of the master or other agent on the voyage or in foreign ports bind

only the ship. But the reason of that rule should forbid its application to contracts of hire entered into by an agent of the owner *with full authority* under the immediate supervision of the owner *no matter how subordinate a position the agent may occupy in the organization of the corporate owner.* In most corporate enterprises, the routine of business established by responsible officials leaves to subordinates full authority for the commission of the acts which create the corporation's contractual obligations. *If the routine established gives a subordinate the authority, the corporation cannot insist that only more important officials should bind it to personal obligations.* Its personal obligations should be determined by the *authority of the one making the contract* to transact that business and not by the importance of his official positions. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770; Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292; 63 L. Ed. 631; Sun Oil Co. v. Dalzell Towing Co., 55 F. (2nd) 63 (C.C.A. 2) affirmed 287 U. S. 291, 53 S. Ct. 135, 77 L. Ed. 311; Great Lakes Towing Co. v. Mills Transp. Co., 155 F. 11, 22 L.R.A. (N. S.) 769 (C.C.A. 6)" (590-591). (Italics ours.)

*Great Lakes Towing Co.* v. *Mills Transportation Co.* (CCA 6) 155 Fed. 11 (1907), is a leading case on the subject of personal contracts. In that case the Great Lakes Towing Company had contracted with one McMorran, manager of respondent, to furnish, at specified rates, all towing and wrecking services required by respondent's steamers during a certain specified time. While the contract was in force, respondent's steamer *Newago* stranded on a reef and the towing company furnished wrecking services under its contract; but the *Newago* nevertheless became a total loss.

The chief question considered by the Court was whether the contract for towing and wrecking services was the personal contract of the Mills Transportation Company, owner

of the *Newago*. In holding this to be personal contract, the Court said:

> "The Mills Transportation Company, being a corporation, could act only through some agency. McMorran was the manager, and was vested with authority to make such contracts as this in behalf of the owner of the vessel, and the contract was the personal contract of the corporation, not in consequence of any principle peculiar to the maritime law, but by virtue of the *common-law rules of agency*.
>
> "But it is then said that the contract was made in behalf of the ship, and so was not the contract of the owner. This, however, rests upon an untenable theory. The contracts of the manager are the actual contracts of the owner, and are not of the same character as the contracts of the master made on a voyage or in foreign ports and which are imputed to the owner from the necessities of commerce" (21). (Italics ours.)

The decision in that case clearly points out the distinction between personal contracts and those not personal. If a corporation expressly authorizes *any one* to enter into a contract on its behalf the contract so made is the personal contract of the corporation, irrespective of the rank of the employee so authorized. On the other hand, the maritime law recognizes a distinction between "the contracts of a master made on a voyage or in foreign ports and which are imputed to the owner from necessities of commerce," and the contracts which bind a vessel owner "not in consequence of any principle peculiar to the maritime law, but by virtue of the common-law rules of agency." *Great Lakes Towing Co.* v. *Mill Transportation Co., supra.* Contracts made by a master and which are merely *imputed* to the owner are not "personal contracts" as the term is used in limitation of liability cases, while contracts which bind a vessel owner by virtue of the common-law rules of agency, are "personal contracts."

The charter in the instant case was no "imputed" obligation; it was an express undertaking of the petitioner, entered into by its duly authorized Marine Superintendent in the course of his duties as such.

Petitioner is guilty of looseness of thought where, under Point III of its brief (pp. 41-45), it argues that since Sweet was not an officer of petitioner, the contract was not personal to it "because the contract of charter was not made by any one of its managing officers but by an employee." As we have shown above, the contract was nevertheless duly authorized by petitioner and was therefore personal to it under the common-law rules of agency.

In the *Proctor & Gamble* case, *supra*, page 3, Judge MANTON also said:

> "The contract was made when the order for the barge was accepted by Capt. Long, an employee. That he had authority to accept orders for the hire of barges is unquestioned. He was appellee's tug dispatcher with full authority to order the movements of appellee's tugs and lighters. He also had authority to hire and discharge crews. He did not fix the rates or price for services rendered to the appellant, but this was done pursuant to the oral standing arrangement between the parties. He did, however, quote rates for individual orders for service. While it is true that there was testimony that in the office with Long there was a chief dispatcher who was his superior in position of employment, still Long accepted orders for tugs and lighters with his knowledge and consent. Long was not a subordinate without authority to bind the appellee to the extent claimed. He had authority to make this contract, and limitation may not be granted upon the theory that his position was so subordinate that the contract should not deprive his principal of limitation of liability" (590).

And further:

> "But it may be said that the corporate agent's authority determines only the validity of the contract but not the extent to which it may be enforced under the limitation of liability acts; that the policy of the statute permits limitation except where a responsible official acts, and so determines not only the validity of the contract, but also unlimited liability under it. Long's position in the corporation was sufficient to deprive it of limitation under this rule. He accepted orders for tugs and lighters and was a manager of the corporation within the rule announced in the cases holding that the contracts of a corporate manager are personal to the corporation. Capitol Transp. Co. v. Cambria Steel Co., supra; The Cullen #32, supra; The Loyal, supra; Great Lakes Towing Co. v. Mills, supra. Since the contract was personal within the rule stated, limitation should have been denied" (591).

It is submitted that Sweet's position and duties carried even more responsibility and authority than were vested in Long in the *Proctor & Gamble Co.* case, *supra.* Long was subordinate to a chief dispatcher, whereas Sweet, in charge of the marine department, had as his immediate superior the Vice-President of the corporation (Sambraus, 74).

As was said in *In Re P. Sanford Ross* (CCA 2) 204 Fed. 248 (1913),

> "* * * the real test is not as to their being officers in a strict sense, but as to the largeness of *their authority*" (251). (Italics ours.)

It is therefore respectfully submitted that under well settled principles, the charter made by Sweet, having admittedly been made with full authority of the corporate owner, was the personal contract of the owner.

**2. The denial of limitation on the personal contract theory was proper.**

The Circuit Court of Appeals denied to petitioner the right to limit its liability because of the breach of its warranty of seaworthiness implied in the contract of charter between petitioner and respondent.

This Court has repeatedly held that in every contract of charter the law affirmatively implies a warranty that the chartered vessel is seaworthy.

In *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681 (1931), this Court, by Mr. Justice STONE, said:

> "By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel, *which would otherwise have been implied*" (684). (Italics ours.)

And in *The Edwin I. Morrison*, 153 U. S. 199 (1894), this Court held that:

> "The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his (the shipowner's) knowledge or ignorance, his care of negligence" (210).

To like effect are the decisions in the following cases:

*The Caledonia*, 157 U. S. 124, 130 (1895);
*Tucker Stevedoring Co.* v. *Southwark Mfg. Co.* (CCA 3), 24 Fed. (2) 410 (1928), cert. den. 277 U. S. 598;
*The Loyal* (CCA 2), 204 Fed. 930 (1913);
*Wessell Duval* v. *Charleston Ltge. Co.*, 25 Fed. (2) 126 (1928).

Both Courts below have found that the scow *Cullen No. 32* was unseaworthy at the time she went under charter to respondent. Petitioner does not now question this finding of fact. It necessarily follows that petitioner has breached its warranty of seaworthiness.

The Circuit Court of Appeals denied to petitioner the right to limitation of liability because of this breach of warranty. This denial finds support in a long list of wholesome authorities, from *In Re Sinclair*, Fed. Cas. No. 12, 895 (22 Fed. Cas. 189), decided in 1860, to the decision of this Court in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, decided in 1919.

The warranty in the instant case was an implied one, as the oral charter was the usual harbor demise containing no express warranty as to the condition of the scow. But this Court has never distinguished between implied and express warranties of seaworthiness in determining the right of a vessel owner to limit liability in a case of cargo damage or charter. And as will be pointed out at greater length hereafter, in *Capitol Transportation Co.* v. *Cambria Steel Co.*, *supra*, the warranty of seaworthiness for the breach of which this Court denied limitation, was *one implied from the oral contract* of charter, there being no express representation as to the condition of the chartered vessel, which is exactly the situation in the instant case.

Since an implied warranty is just as much a part of a contract as the express terms thereof, there can be no logical distinction, we submit, between the two types of representations. In *Sacremento Nav. Co.* v. *Salz*, 273 U. S. 326 (1927), this Court said:

> "* * * a contract includes, not only the promises set forth in express words, but, in addition, *all such implied provisions* as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances

under which it was made. 3 Williston on Contracts S 1293; Brodie v. Cardiff Corporation, 1919 A. C. 337, 358" (329). (Italics ours.)

The denial of limitation to a vessel owner because of a breach of warranty of seaworthiness is based on the rule which holds that the limitation of liability statutes have no application to the personal contracts of the vessel owner. For these personal contracts the owner is liable without limitation.

Apparently the first reported decision in this country on the personal contract doctrine is found in *Re Sinclair,* Fed. Cas. No. 12,895 (22 Fed. Cas. 189), decided in 1860 by Judge MAGRATH in the Eastern District of South Carolina. In that case goods which had been shipped on the schooner *Ella* were damaged when the schooner had to be grounded because of a leak occasioned by her unseaworthiness. The owner of the schooner petitioned to limit his liability for the cargo losses to the value of the schooner. The Court held that petitioner was not entitled to limitation under the Act of 1851, since there had been a breach of the owner's *implied warranty* that the ship was seaworthy at the time of sailing. The Court said:

> "In this case the contract was with the master, but it was strictly within the limits of his authority, and became the contract of the owner, as complete and binding upon him, as if he had personally made it. The law connects with his contract a representation, presumed to have been given; inserts in it a covenant *presumed to have been made;* and that representation the law declares shall proceed from the owner; and that covenant be considered as made by him. It has ever been the policy of the law to refer the liability for seaworthiness directly to the owner and hold him liable for it. A loss from that cause is held to be a loss proceeding from a failure in a representation of the owner, a breach in his covenant" (193-194). (Italics ours.)

Although petitioner boldly states (Brief, p. 12), "So far as we are aware it has never been held in any case that under the provisions of the Act of 1851 the vessel owner is not entitled to limit liability where the damage or loss of cargo is without his privity or knowledge because he has entered into a personal contract for the carriage of goods," the decision in the *Sinclair* case was under the Act of 1851, and Judge MAGRATH squarely held that under that Act a vessel owner is not entitled to limitation of liability for cargo damage where he has breached an implied warranty of seaworthiness. Indeed, that decision was made in 1860, which was before the Act of 1884 had come into being.

We cannot follow the logic of petitioner's argument wherein it claims that all the decisions denying a vessel owner limitation of liability were rendered under the Act of 1884 rather than under the Act of 1851. Indeed, the wording of the Act of 1884 is much stronger in favor of *vessel owners* than is the wording of the Act of 1851, and if the Act of 1884 were read unattached from the Act of 1851, it would provide an absolute limit on the liability of *all* vessel owners for *all* losses, *without regard to their personal privity in the losses.* For the Act of 1884 contains nothing at all about "privity or knowledge" of the shipowner, and provides merely as follows:

> "The individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same *shall not exceed the value of such vessels and freight pending.* * * *" (Italics ours.) (23 Stat. 57; 46 U.S.C.A. §189.)

Reading that Act alone, and unattached to the Act of 1851, the provision is for an absolute and unconditional limitation of the vessel owner's liability, regardless of any

breach of contract or gross personal neglect contributing to the loss; for the liability "shall not exceed the value of such vessels and freight pending," without any qualification.

The inconsistency of petitioner's argument respecting the Act of 1884 demonstrates its entire lack of soundness. Petitioner says (Brief, p. 13):

> "The decisions upon this subject (personal contracts in limitation of liability cases) have never considered the effect of the Act of 1851 at all but are all based upon the Act of 1884."

But how can a decision denying limitation be based upon an Act which contains no provision for the denial of limitation? The Act of 1851 contains a provision for the denial of limitation; the Act of 1884 does not. Yet petitioner is attempting to convince your Honors that the decisions denying limitation of liability because of personal contracts are based upon an act which, if read alone and without reference to the basic Act of 1851, grants an absolute and unconditional limitation of liability, and makes no provision at all for denying limitation.

Petitioner concedes the fallacy of its argument where it says (Brief, p. 13) that "The sole effect of the Act of 1884 was to enlarge the scope of the limitation laws and to permit the vessel owner to limit liability against claims not included within the provisions of the Act of 1851." For if the Act of 1884 merely enlarges the scope of the Act of 1851, it would clearly appear that the two must be construed together, and as part and parcel of the same law.

This Court so held in *Richardson* v. *Harmon*, 222 U. S. 96 (1911) where Mr. Justice LURTON said:

> "Neither is it necessary to conclude that the section in question (Section 18 of the Act of 1884) is a repealing act as to any of the qualifications of the preceding limitations found in §§4283, *et seq.*, of the

> Revised Statutes. To so hold would be to attribute to Congress a wider purpose than we have any reason to suppose—that of extending the benefits of §§4283, *et seq.*, regardless of the owner's knowledge or privity.
>
> * * * * * * * *
>
> "We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included" (105).

The Act of 1851 conferred limitation of liability as to torts, etc., occurring without the owner's privity or knowledge, while the Act of 1884 merely extended that limitation to debts and other liabilities of the owner.

Such is the law as declared by the Circuit Court of Appeals for the Second Circuit (certiorari denied by this Court) in *American Warehouse* v. *Davison* (CCA 2) 240 Fed. 126 (1917), cert. den. 243 U. S. 642. There Judge WARD said:

> "It is now perfectly well settled that the acts of 1851 and 1884, are to be construed in *pari materia*. The former conferred exemption as to torts occurring without the privity or knowledge of the owner, and the latter extended this privilege to debts and other liabilities of the owner" (128).

And the doctrine that the two Acts are to be construed together is well settled.

In *Gokey* v. *Fort*, 44 Fed. 364 (1890), Judge ADDISON BROWN, six years after the passage of the Act of 1884, so held, saying:

> "I think the act of 1884 is doubtless to be treated *in pari materia* with the act of 1851 (Rev. St. §§4233, 4285,) and designed to extend the act of 1851 to cases of the master's acts or contracts, and thus bring our law into harmony with the general maritime law on the subject" (365).

In *The Republic* (CCA 2) 61 Fed. 109 (1894), Judge WALLACE said:

> "We do not understand it to be seriously argued that section 18 of the act of congress of June 26, 1884, displaces the liability of shipowners for losses occasioned by their own negligent acts. The section does not purport to repeal any pre-existing law, but is legislation in *pari materia* with the act of 1851" (113).

In *Great Lakes* v. *Mills* (CCA 6) 155 Fed. 11 (1907), cert. den. 207 U. S. 596, 52 L. Ed. 357, 28 S. Ct. 262, the Court, after quoting both the Act of 1851 and the Act of 1884, held that the two Acts should be construed together. The Court said:

> "These two provisions, relating as they do to the same class of persons and to the same subject, should be regarded as regulations in *pari materia*, and should be construed as *parts of an entire scheme*. We refer to this rule of construction of statutes in *pari materia*, because, as will be noticed, the words 'done, occasioned or incurred, without the privity or knowledge of such owner or owners,' which are contained in the act of 1851 are not employed in the act of 1884. * * * Another reason for thinking that the eighteenth section of the act of 1884 was intended as an extension merely of the relief provided by the act of 1851 is found in the fact that the act of 1851 contains provisions for the procedure in applying for limitation. * * * But the act of 1884 provides no procedure for administering its provisions. And this, we think, furnishes an inference that the act of 1851 was regarded as the basic law, to which section 18 of the act of 1884 was intended to be supplementary" (15). (Italics ours.)

In *Benner Line* v. *Pendleton* (CCA 2) 217 Fed. 497 (1914), affd. 246 U. S. 353, the Court also quoted the two Acts and Judge ROGERS said:

> "The two acts have been regarded as being in *pari materia* and therefore have been construed as parts of one entire scheme" (506).

See also:

*Rudolph* v. *Brown*, 137 Fed. 106 (1905).

How then can petitioner argue that whenever limitation has been denied because of a personal contract, the denial was under the Act of 1884 to the exclusion of the Act of 1851? The two Acts being part of the same scheme of legislation, and relating to an identical class of persons and an identical subject matter, denial of limitation for breach of a personal contract must necessarily have been decreed with both Acts under consideration. And moreover the denial of limitation must necessarily have been in all cases under the Act of 1851 as the basic law, for the Act of 1884 contains no provision whatsoever for denying limitation in any case except for seamen's wages. Petitioner has inadvertently recognized this, where, in the middle of page 26 of its brief, it refers to the Act of 1851 as the "basic statute."

It would therefore appear clear, and we respectfully submit, that wherever a decision denying limitation discusses the Act of 1884, the Act of 1851 must have been under consideration by the Court as the basic law on the question.

Apparently the next decision after Judge MAGRATH's decision in *Re Sinclair, supra*, page 10, involving the personal contract doctrine, was rendered in 1888 in the case of *The Amos D. Carver*, 35 Fed. 665 (1888). In that case the vessel was sold and her proceeds were insufficient to pay the claims of the several lienors. Judge ADDISON BROWN held that the vessel owners were responsible *in personam* for supplies furnished to the vessel upon their contract to pay for them. Judge BROWN said:

> "The act of 1884 limiting the liability of the owners of a vessel on account of the same, does not,

> I think, restrict the liability of the owners upon their own personal contracts, but only their liability 'on account of the vessel'; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contracts or acts of the ship, or her master, without the owner's express intervention" (669).

The ruling was repeated by Judge BROWN in the following year in *Laverty* v. *Clausen,* 40 Fed. 542 (1889), in holding a vessel owner liable *in personam* for breach of a contract to insure cargo under the Act of 1851 and the Act of 1884. Again, a similar ruling was made by Judge NELSON in the District Court of Massachusetts in *McPhail* v. *Williams,* 41 Fed. 61 (1890) with respect to claims of material men for repairs and supplies furnished to the ship upon the authority of her owners. Judge NELSON said:

> "Certainly there was no occasion for Congress to legislate to limit the liability of shipowners on contracts which they enter into personally, or expressly authorize" (62).

A similar ruling was made by Judge ADDISON BROWN in *Gokey* v. *Fort,* 44 Fed. 364 (1890).

Evidently the next case wherein the question was passed upon was *Great Lakes Towing Co.* v. *Mill Transp. Co.* (CCA 6) 155 Fed. 11 (1907), cert. den. 207 U. S. 596, 28 S. Ct. 262. In that case a vessel owner had made a contract with a tug owner whereby the tug owner furnished services, including wrecking, to the vessels, at certain named rates. During the life of the contract, one of the steamers stranded in a place of great danger, and the tug owner dispatched a tug at the request of the vessel owner, to render wrecking services to the stranded vessel pursuant to the terms of the contract. The tug attempted for ten days to release the steamer from the strand, but her efforts were unsuccessful and the steamer was lost, only about $156 worth

of her equipment having been saved. The vessel owner then petitioned to limit its liability under the Acts of 1851 and of 1884, to the $156. The Circuit Court of Appeals denied the vessel owner's petition, saying:

> "It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about anything else and would be enforced in the courts in common-law actions. *It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs, or be given such an immunity as to make his stipulations of uncertain value*" (16). (Italics ours.)

And further:

> "Most of the cases which have been referred to were cases of negligence or some other tort of the owners, but, if as we suppose we should hold liabilities arising from contracts are included by the 18th section of the act of 1884, it must, we think, be admitted that, as the statute ranks them together and makes no distinction as regards the ground of liability, if negligence on the part of the owner deprives him of the right to a limitation, surely *his voluntary creation of the liability ought with greater reason to bar his right to the limitation*" (21).

The first word spoken on the subject by this Court, so far as we have been able to find, is in *Richardson* v. *Harmon*, 222 U. S. 96 (1911), where Mr. Justice LURTON, speaking of the Limited Liability Acts, including the Act of 1851 as well as of 1884, said:

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, * * * but *leaves him liable for his own* fault, neglect and *contracts*" (106). (Italics ours.)

*The Loyal* (CCA 2) 204 Fed. 930, decided in 1913, appears to be the first case wherein an Appellate Court held that an *implied* warranty of seaworthiness was such a personal undertaking on the part of the owners that the breach of such a warranty was sufficient to defeat limitation. In that case libelants rendered salvage services to owners of a cargo on a lighter which sprang a leak because of her unseaworthiness. The owners of the cargo contended that the lighter owner was liable for any salvage which it might have to pay libelant. The lighter owner attempted to limit liability, the lighter being a total loss. In denying to the lighter owner the right to limit, Judge NOYES said:

> "The vessel-owner had a written contract with the cargo-owner for lighterage services covering an extended period. This lighterage contract *implied an obligation* that the lighters to be furnished under it should be seaworthy and if this one were in fact unseaworthy (as we have found she was) and if the unseaworthiness made the salvage services necessary (as it unquestionably did) the salvage award ran properly against the vessel-owner subject to any right to limit its liability.
>
> "A vessel-owner is not entitled to limit his liability upon his personal contracts. The distinction between those contractual obligations which the owner of a vessel assumes himself by entering into them and those which are imputed to him for the acts of others on account of his ownership of the vessel, is well settled and is clearly pointed out in the opinion of the Circuit Court of Appeals for the Sixth Circuit in Great Lakes Towing Company v. Mills Transp. Company, 155 Fed. 11, * * *
>
> * * * * * * * * *
>
> "The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, *just as much the personal contract of the vessel-owner as the express contract itself.* It was

> precisely as if written in the contract. The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others. It was a contract from which the owner could not obtain immunity by the limitation statute, and this whether the breach of the contract was caused by the owner's acts or those of its agents. We are unable to accept the contention that a vessel-owner may be relieved from responsibility upon his personal contracts provided he does not break them himself. *The making of the contract* is enough to place it outside the statute" (931-933). (Italics ours.)

Nor did *The Ice King* (CCA 2) 261 Fed. 897 (1919), overrule *The Loyal, supra,* as stated by petitioner (Brief, pp. 7-8). In that case a tow sustained damage on account of the pilot of the tug having become intoxicated, which rendered the tug unseaworthy. But the Court held that there was no *continuing* warranty of seaworthiness, and the tug having been seaworthy at the time of sailing, there was no breach of the warranty of seaworthiness. Indeed, Judge WARD was careful to distinguish *The Loyal* from *The Ice King,* where he pointed out that the doctrine of *The Loyal* was limited to cargo losses and had no application to a case of tug and tow. Although petitioner says that the decisions of the Circuit Court of Appeals for the Second Circuit "have been like the swing of a pendulum" (Brief, p. 15), the decisions of that Court have always been to the effect that the breach of an implied warranty of seaworthiness destroys the right to limit liability.

*The Loyal* was followed and approved by this Court in a decision wherein the rule stated in *Richardson* v. *Harmon, supra,* 222 U. S. 96, was reiterated and affirmed. That decision is *Pendleton* v. *Benner Line,* 246 U. S. 353, decided in 1918.

In *Pendleton* v. *Benner Line, supra,* a schooner was chartered to the Benner Line, the charter party containing the owner's express warranty of seaworthiness. Subsequently, and on account of the schooner's unseaworthiness, the schooner sank and her entire cargo was lost. In a suit brought by Benner Line against the owner to recover for the damages resulting from the sinking of the schooner, the owner (Pendleton) was denied the right of limitation of liability because of his personal contract. Mr. Justice HOLMES, delivering the opinion of the Court, said:

> "That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson* v. *Harmon,* 222 U. S. 96. It was said in that case, p. 106, that §18 leaves the owner 'liable for his own fault, neglect and contracts.' The principle was held to apply to contracts less personal than this in *Great Lakes Towing Co.* v. *Mill Transportation Co.,* 155 Fed. Rep. 11, and in *The Loyal,* 204 Fed. Rep. 930. We are not disposed to disturb the very strong and deliberate intimations of *Richardson* v. *Harmon* in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not" (356-357).

It is to be observed that this Court inferentially put its stamp of approval upon *The Loyal* by saying, "The principle was held to apply to contracts less personal than this in * * * *The Loyal,* 204 Fed. Rep. 930."

In *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139 (1918), the steamship *Julia Luckenbach* was under time charter to the Insular Line, the charter party containing an

express warranty of seaworthiness. In the suit brought by the Sugar Company for damage to cargo shipped on the *Luckenbach,* which resulted from the steamer's unseaworthiness, the vessel owner was denied the right of limitation of liability because of its personal contract. Mr. Justice BRANDEIS, delivering the opinion of this Court said:

> "The owners contend that, under §4283 of the Revised Statutes and §18 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 57, their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. *But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. Pendleton* v. *Benner Line,* 246 U. S. 353" (149). (Italics ours.)

In *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 334 (1919), as in *The Loyal, supra,* the warranty of seaworthiness, the breach of which was held to defeat limitation of liability, was *implied* and not express. That case, we believe, is the first case wherein this Court passed upon the effect of a breach of an *implied* warranty, rather than an express warranty, on a vessel owner's right to obtain limitation of liability. This Court held that the breach of such a warranty defeated the right to limit, notwithstanding petitioner's statement that this Court has never held that "the vessel owner may not limit liability for cargo losses because he has made a personal contract, under which an implied warranty of the vessel (*sic*) is imputed to him by law" (Brief, p. 9). In that case the Cambria Steel Company was in the market to secure the transportation of certain steel rails from Conneaut, Ohio, to Superior, Wisconsin. An oral contract for the transportation was made between the Steel

Company and the corporate owner of the steamer *Benjamin Noble,* the latter being represented in the making of the contract by Mr. Francombe, the vessel's manager. The method by which the contract was made is thus stated in the District Court (*The Benjamin Noble,* 232 Fed. 382):

> "Mitchell & Co. (local agents) communicated with Mr. Francombe, and a contract was made between the Capitol Transportation Company, represented by Mr. Francombe, and the Cambria Steel Company, represented by Hanna & Co. for the transporting of these rails on the Nobel at a rate of 80 cents per ton" (384).

The further fact that the *Noble,* the carrying vessel, was intrinsically seaworthy and that her master and crew were qualified, was found by the Court, as follows:

> "So we start in with this well built and seaworthy ship (as to condition of hull and construction) at Conneaut, with a master and crew qualified for their positions; with the owner of the ship having made a *personal contract* with the owner of the cargo to carry 3000 tons of steel rails on the first trip of the season from Conneaut to Superior" (385).

The *Noble* left Conneaut after loading about 2950 tons of rails, and proceeded to Detroit and through the Soo Canal. Shortly after leaving the canal, a storm of considerable intensity came up and she was never heard of again. It was held that she was unseaworthy because of overloading and that her owners were not entitled to limit liability.

The Circuit Court of Appeals for the Sixth Circuit affirmed the decree (*The Benjamin Noble,* 244 Fed. 95), saying:

> "Francombe sanctioned and in effect made the verbal contract of affreightment out of which the present controversy grew; and the contractual obliga-

tion so created was the personal contract of appellant" (100).

The case then came before this Court pursuant to a writ of certiorari and this Court affirmed the decrees of both lower courts. Mr. Justice HOLMES said:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. *That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided* * * *" (336-337). (Italics ours.)

The holding in that case is, we respectfully submit, directly in point with the case at bar. There, as in the instant case, the contract was oral and there was no express warranty of seaworthiness. This Court nevertheless implied a warranty of seaworthiness into the oral contract, and, on the breach of the implied warranty, denied limitation of liability to the vessel owner. Under the authority of this Court's decision in *Capitol Transportation Co.* v. *Cambria Steel Co., supra,* it is respectfully submitted that the petition of Cullen Fuel Company for limitation of liability was properly denied.

The rule to the effect that the breach of an *implied* warranty of seaworthiness will defeat limitation, has also been followed in Third Circuit in the recent case of *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.* (CCA 3) 24 Fed. (2)

410 (1928), cert. den. 277 U. S. 598. In that case a lighter sank because of unseaworthiness, and her cargo became a total loss. The Circuit Court of Appeals held that the owner of the lighter was not entitled to limit liability because it had breached its implied warranty of seaworthiness in the lighterage contract. The Court said:

> "The contract contained no stipulation that the barges were to be seaworthy, so the question is: Was there an *implied contract* of lighter seaworthiness *which the law writes into this contract* for lighterage service? The present contract being for lighterage, we think there was an implied contract that the lighters would be seaworthy. In that regard we agree with the holding of The Loyal (C. C. A.), 204 Fed. 931, where it was said: 'The vessel owner had a written contract with the cargo owner for lighterage services covering an extended period. This lighterage contract implied an obligation that the lighter to be furnished under it should be seaworthy. * * * The implied contract that the lighter was seaworthy attached to the * * * contract, was, in our opinion, just as much the personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract.'
>
> "Such being the case, and the contract in hand having imported into it a stipulation for seaworthiness, and thereby made the personal contract of the lighterage company, we agree with the reasoning of the Circuit Court of Appeals of the Second Circuit in the foregoing case, and that of the Sixth Circuit in Great Lakes Towing Co. v. Mill Transp. Co., 155 Fed. 11" (410). (Italics ours.)

Petitioner apparently does not question the soundness of the decisions of this Court and of other Federal Courts denying limitation of liability for the breach of an *express* personal contract, but argues that such a doctrine should



not apply in a case where the breach is of an *implied* provision of the contract.

But is there any force in the contention that an implied stipulation in a contract does not have all of the valid and binding effect which would have attached had the stipulation been expressed? It is respectfully submitted that there is no reason or authority for such an argument.

It has been settled by decisions which are legion that an implied provision of a contract is just as valid and binding on the parties as are the expressed provisions, and that a provision necessarily implied gains nothing by being expressed.

Thus, in *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall. (75 U. S.) 276 (1868), Mr. Justice CLIFFORD, speaking for this Court, said:

> "Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed" (288).

In *Zanes* v. *Lehigh Valley Transit Co.*, 41 Fed. (2) 552 (1930), the Court said:

> "Aside from statutes of fraud or other control of the forms of contracts, we see no difference in the obligation or binding force of contracts, *whether they be express or implied*" (554). (Italics ours.)

In *Grossman* v. *Schenker*, 206 N. Y. 466, 100 N. E. 39 (1912), the Court of Appeals of New York said:

> "'What is implied in an express contract is as much a part of it as what is expressed' (Bishop on Contracts [2d ed.], §241); for 'the law is a silent factor in every contract'" (469).

In the case at bar, the express contract was for the hire of the scow, but the law, "a silent factor in every contract,"

implied the owner's warranty that the scow was seaworthy, and, we submit, the implied provision as to seaworthiness is as much a part of the contract of charter as that which was expressed.

In *United States* v. *Bentley*, 293 Fed. 229 (1923), the Court said:

> "The * * * right * * * if not affirmatively expressed, is at least necessarily implied, and what is implied is *as much a part of the contract as what is expressed*" (240). (Italics ours.)

In *Johnson* v. *City of New York* (N. Y.), 191 App. Div. 205, 181 N. Y. Sup. 137 (1920), affd. 231 N. Y. 563, 132 N. E. 889, the Court said:

> "An obligation necessarily implied from the whole purpose and scope of the contract, is as much a part thereof as if expressed in its wording. Mansfield v. N. Y. C. & H. R. R. R. Co., 102 N. Y. 205, 6. N. E. 386; City of New York v. Paoli, 202 N. Y. 18, 94 N. E. 1077; Wigand v. Backmann-Bechtel Brewing Co., 222 N. Y. 278, 118 N. E. 618" (139).

See also:

> *Fellows* v. *Fairbanks* (N. Y.) 205 App. Div. 271, 199 N. Y. Sup. 772 (1923).

There are, it is true, some cases which distinguish between the breach of an implied warranty and an express warranty, but we submit that those cases are in the minority, and that a sound and logical rule requires that no such distinction be made. Indeed, as we have pointed out *supra*, this Court made no such distinction in *Capitol Transportation Co.* v. *Cambria Steel Co., supra*, page 21, and denied limitation of liability for breach of an implied warranty of seaworthiness, exactly as is involved in the instant case.

Petitioner, at page 31 of its brief, mentions the Fire Act, and argues that the rule as to personal contracts in limitation of liability cases must apply with equal force to losses involving the application of the Fire Act. But this Court has held that the Fire Act and the Limitation of Liability Acts are separate and distinct acts, and that rules which apply in limitation cases have no application to cases under the Fire Act. Thus in *Earl & Stoddard* v. *Ellerman's Wilson Line, Ltd.* (*The Galileo*), 77 L. Ed. 242, 1933 A. M. C. 1, which involved the Fire Act, this Court declared that the doctrine of the case was not to be confused with *The Malcolm Baxter*, 277 U. S. 323, which was a limitation of liability and Harter Act case. Mr. Justice BRANDEIS said:

> "The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what *in other connections* is held to be a non-delegable duty. Nothing contained in the opinion of this Court in The Malcolm Baxter, Jr. (France v. French Overseas Corp.), 277 U. S. 323, 72 L. Ed. 901, 48 S. Ct. 516, is to be taken as indicating a different view" (244-245). (Italics ours.)

And in *The Malcolm Baxter, Jr.*, the denial of the plea for limitation of liability was placed by this Court and by both subordinate Courts upon the ground that the *Baxter* was unseaworthy on sailing, and that her owner *"failed to exercise due diligence to ascertain her condition"* (277 U. S. 331), which was the identical ground upon which the District Judge rested his decision denying limitation of liability to the petitioner in the instant case. This point is treated in this brief under Point III, *infra*.

That the statute dealing with the *limitation* of a vessel owner's liability and the statute dealing with his *total lack* of liability for fire losses are separate and distinct, and should not be confused with each other, is further shown

by the words of Mr. Justice BRANDEIS in *The Galileo, supra,* where he said:

> "Here the inquiry is not whether there was a 'personal contract,' on which the shipowner can be held to the full amount of the loss, but whether he can be held liable at all. He cannot be held liable unless by agreement, or otherwise, he has waived the benefit of the fire statute" (77 L. Ed. 245).

The distinction between the two acts is further borne out by the different rules of law applicable to the Acts respectively. For instance, under the Limited Liability Act the burden of proof is upon the vessel owner:

*The Benjamin Noble* (CCA 6) 244 Fed. 95, affd. *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334, 63 L. Ed. 631;
*La Bourgogne* (CCA 2) 144 Fed. 781, affd. *Deslions* v. *La Compagnie,* 210 U. S. 95, 52 L. Ed. 973;
*In re Reichert* (CCA 2) 251 Fed. 214, cert. den. 248 U. S. 565, 63 L. Ed. 424;
*McGill* v. *Michigan* (CCA 9) 144 Fed. 788, cert. den. 203 U. S. 593, 51 L. Ed. 332;
*In re Hedger* (CCA 2) 59 Fed. (2nd) 982;

whereas under the Fire Act, the burden of proof is upon the cargo owner:

*The Salvore* (CCA 2) 60 Fed. (2) 683;
*In re Old Dominion S. S. Co.,* 115 Fed. 845;
*The Strathdon,* 89 Fed. 374.

Concluding this point, it is respectfully submitted that since Sweet admittedly had petitioner's full authority to make the contract of charter as petitioner's agent in this case, the contract was as personal to petitioner as if it had been made by any other of petitioner's duly authorized

agents; this Court had never made any distinction between an implied warranty and an express warranty of seaworthiness and in *Capitol Transportation Co.* v. *Cambria Steel Co., supra,* pages 21-23, denied limitation of liability for the breach of such an implied warranty; in principle there should be no distinction between the two classes of warranties, for, as this Court said in *Hudson Canal Co.* v. *Pennsylvania Coal Co., supra,* page 25, "Necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed"; the petitioner, therefore, was properly denied limitation for breach of its warranty of seaworthiness.

## II.

### The Court properly held that respondent was entitled to maintain this suit as bailee of the cargo.

Petitioner argues (Brief, pp. 36-41) that petitioner made no contract for the carriage of cargo and that respondent has no standing in court to complain of the cargo loss, although respondent was the bailee of the cargo at the time, and notwithstanding that petitioner admits that respondent was thereby entitled to maintain a suit, arising out of his bare possession of the property, against the party responsible for the loss (Brief, p. 39).

No question as to respondent's right to maintain the suit was raised in the District Court, and it came up for the first time on the argument in the Circuit Court of Appeals. The record, therefore, did not contain any of the details of Hedger's relation with its underwriters or with the Grasselli Chemical Company, for which Hedger was transporting the cargo at the time of the loss. At the beginning of the trial it was merely stipulated that Hedger, as demise charterer,

was bailee of the cargo (Record, 16). But this much was shown by the record:

Hedger had agreed with the Grasselli Chemical Company to transport the cargo of the steamer *Berk,* then at the foot of Roosevelt Street, East River, New York, to Grasselli, New Jersey, and it was pursuant to that contract that the scow *No. 32* had been chartered and loaded with pyrites ore from the *Berk* (Pierce, 109; Opinion of District Court, 115; Opinion of Circuit Court of Appeals, 131).

Hedger, therefore, as a matter of law, warranted the seaworthiness of the scow to the Grasselli Chemical Co., and was liable to that company for a cargo loss caused by the scow's unseaworthiness. Therefore, the bailee's right to sue could be placed upon its liability over to the cargo owner (as this Court held in *Pendleton* v. *Benner Line, supra,* p. 19) or upon its mere possession of the goods, as petitioner concedes at page 39 of its brief.

The Circuit Court of Appeals chose to permit the respondent-bailee to maintain the suit upon the former ground, saying:

> "The question arises whether the Hedger Company as bailee of the cargo can recover for its loss upon the Cullen Company's breach of warranty of seaworthiness. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770, so decided, where the libellant, the charterer, was liable for the shipper's loss and was suing for the cargo underwriters. The present case will be controlled by that authority provided the Hedger Company is shown to be liable to the cargo owner, Grasselli Chemical Company. While it does not definitely appear what were the relations between the Hedger Company and the Grasselli Company, it was proved that the former agreed to carry the cargo for the latter and *prima facie* this made it liable for the loss. Taylor Bros. Lumber Co. v. Sunset Lighterage Co., supra. The lighterage contract implies a

warranty that the lighters to be furnished under it shall be seaworthy. The Loyal, 204 F. 930 (C.C.A. 2); The Jungshoved, 290 F. 733 (C.C.A. 2). If there were any express conditions in the contract which would excuse the Hedger Company as against the cargo owner, they do not appear. Hence the proof was sufficient that the charterer was liable for loss of cargo due to the scow's unseaworthiness. See The Harper No. 145, 42 F. (2d) 161 (C.C.A. 2); S. C. Loveland v. Bethlehem Steel Co., 33 F. (2d) 655 (C.C.A. 3). This liability is a proper element of damages in its suit against the owner upon the latter's covenant. Pendleton v. Benner Line, supra" (*The Cullen No. 32* [CCA 2] 62 Fed. [2] 68, 69-70; Record, p. 131).

In its brief petitioner argues that the right of the bailee to sue for damages to the bailed property arises merely out of his possession of the property. Petitioner says:

> "While it is undoubtedly true that the historical origin of the right of a bailee to sue for damage to the property in his possession under a bailment rests upon the theory of the liability of the bailee over, yet we submit that Mr. Justice Holmes (in Pendleton v. Benner Line) stated that that doctrine is inadequate and we submit that the more modern theory is, that the right of the bailee to recover arises out of his possession of the property, which he has a right to maintain as against the entire world, except the bailor under some conditions" (Brief, p. 39).

We confess that we are unable to see why any different result should be reached by making such a distinction. If the bailee has a right to sue for damage to the bailed property by reason of his possession of the property, we submit that the respondent herein is entitled to maintain this suit, regardless, indeed, of its liability over to the cargo owner. But as we have argued *supra*, the bailee was liable over to

the cargo owner, and the Circuit Court of Appeals so found and held.

Such was the reasoning of this Court in permitting the bailee to maintain the suit in *Pendleton* v. *Benner Line*, *supra*, page 19. In that case suit was brought by the Benner Line, as charterer of a schooner and as bailee of the cargo laden thereon, against Pendleton Brothers, the owners of the schooner, *in personam* to recover for the loss of the cargo, resulting from the sinking and total loss of the schooner. The ground of the suit was the unseaworthiness of the vessel, whereby the cargo loss resulted, and the owners of the vessel petitioned for limitation of their liability. The Benner Line (the charterer bailee) had not paid the owners of the cargo for the loss, nor had it been called upon to pay, and brought the suit solely on the theory of its relation of bailee to the cargo owners. This Court held that it was entitled to maintain the suit. Mr. Justice HOLMES, after discussing the charter of the schooner (which was *not* a demise) and the question of who had possession of the goods when they were lost, decided that the charterer bailee was entitled to maintain the suit, and said:

> "The owners of the vessel had warranted the seaworthiness of the ship to the charterer, of course in contemplation that a cargo would be shipped as to which they would be liable in some form. Wherever in theory of law the technical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Ed. IV, 34 pl. 9, is an example of what has been repeated from that day to this. See *Brewster* v. *Warner*, 136 Massachusetts 57, 59. Whatever may be the inadequacy, in history or

> theory, of the reason as applied to torts, *it applies with real force to contract relations like those in this case.* The whole question is hardly more than technical as there is no doubt that this suit really represents the owners' interests since it is brought at the request of the insurers who have paid the loss" (355-356). (Italics ours.)

That case, we respectfully submit, establishes the right of the charterer to proceed as bailee against the owner *in personam* for breach of the warranty of seaworthiness, and recover full damages to the cargo. We beg your Honors to consider the similarity between the *Pendleton* case and the case on appeal. In both cases vessels were chartered to carry the goods of third parties; in both cases the vessels sank because of unseaworthiness and the goods were lost; in both cases *in rem* liability was of no value and the only hope of recovery was the *in personam* liability of the owners of the vessel; in both cases the warranty of the vessel's seaworthiness was made by the owner to the charterer only, and not to the owners of the cargo; in both cases the owner knew that the purpose of the charter was to carry cargo. And in the *Pendleton* case the charterer-bailee had not even been asked to pay for the loss of the cargo, and yet it was allowed to maintain the suit against the owners of the vessel on the ground of its liability over to the cargo owners.

Petitioner makes an abortive attempt (Brief, p. 37) to distinguish between the instant case and the *Pendleton* case. Petitioner says:

> "There is a marked distinction between the *Pendleton* case and the present one. In the former case Pendleton, the owner of the schooner, made a charter to the Benner Line but that charter did not amount to a demise, while the charter in this instant case was a demise."

Petitioner fails to state the effect of that distinction; and the only effect that we can perceive is that in the instant case Hedger was even more of a bailee than was the Benner Line in the *Pendleton* case. For it appears obvious that a demise charterer has more exclusive possession of the goods on the chartered vessel than does a time charterer or a voyage charterer. Thus, we submit, the demise charterer in the instant case, should be held more clearly entitled to maintain the suit than was the charterer in the *Pendleton* case.

In *Luckenbach* v. *McCahan Sugar Co., supra*, p. 20, the cargo owner was allowed a full recovery against the owner of the vessel on the breach of the latter's warranty of seaworthiness made to the charterer, the Insular Line, although there was no privity of contract between the cargo owner and the vessel owner, and the vessel owner was denied limitation of its liability for the cargo loss.

Petitioner also mentions the fact (Brief, p. 36) that:

> "Cullen warranted the seaworthiness of the barge to Hedger, but that warranty was only as to the seaworthiness of the boat at the time of its delivery to the charterer and it was not a continuing one."

But both Courts below concurred in finding that the scow was unseaworthy *at the time of her delivery* under charter.

*The Cullen No. 32* (D. C.) 45 Fed. (2) 859, 862-863;

*The Cullen No. 32* (CCA) 62 Fed. (2) 68, 69.

## III.

**Regardless of the effect of petitioner's breach of warranty, it was correctly denied limitation because it utterly failed to prove its freedom from privity or knowledge in the unseaworthy condition of the scow.**

The decision in the District Court, denying petitioner limitation of its liability, was placed upon the ground that the responsible agent of petitioner, who should have kept himself familiar with the condition of the scow, had failed to do so and that the ensuing cargo loss was accordingly within the privity or knowledge of petitioner.

The rule is well settled that the failure to conduct a proper and sufficient examination of a vessel before loading cargo upon her, or before letting her under charter, is sufficient to render her owner in "privity or knowledge" of her unseaworthy condition, if cargo sustains damage from the vessel's unseaworthiness.

Such was the holding of both this Court and of the Circuit Court of Appeals for the Second Circuit in *The Malcolm Baxter* (CCA 2) 20 Fed. (2) 304, affd. 277 U. S. 323.

In passing upon that question the Circuit Court of Appeals said:

> "The evidence sustains the finding of the District Court that the Baxter was unseaworthy when she left New Orleans, and that such fact *could have been discovered by due diligence.* The petition to limit liability was properly denied" (20 Fed. (2) 305). (Italics ours.)

When the case was before this Court on certiorari, Mr. Justice STONE said:

> "Both courts below agreed that the Baxter was unseaworthy on sailing, and that respondent (petitioner for limitation) *failed to exercise due diligence to as-*

> *certain her condition* before sailing. This was sufficient ground for denying the petition for * * * limitation of liability" (277. U. S. 331). (Italics ours.)

What diligence, then, did petitioner exercise to ascertain the condition of *No. 32* before letting her under charter to respondent?

The only inspection or examination conducted by petitioner was the cursory and perfunctory "looking over" by Sweet, petitioner's Marine Superintendent. Sweet testified that he had "seen the boat" before she was put under charter. At that time she was light, drawing about two feet of water. Sweet's examination consisted of going through the boat with a flashlight, with which he "looked all around" (Sweet, 19, 21-22).

He testified:

> "Q. Tell us exactly what you did when you made this examination? A. Well, I was down in there and I looked at her deck beams to see if they were—
>
> Q. That is the beams, the upper beams on the deck? A. Yes; and I looked at her sides to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 22).

Sweet was content to rely on what he could see by flashing his light on her deck beams and side planks, and was apparently satisfied with the condition of the scow because he found no "planks broken."

Sambraus, Vice President of the scow owner, admitted that such an inspection would not disclose the existence of a leak above the light water line, and that "you have to guess at it" (Sambraus, 76).

Sweet purported to have also examined the outside of the scow's hull, but it developed that such "examination" was made by standing on her deck and looking down over her

gunwale. Moreover, he could only see one of her sides at that time, for the other side was up against the pier (Sweet, 31).

It was not shown how old *No. 32* was, when she had last been caulked or in drydock for repairs, whether or not anything had happened to her between the time she carried her last cargo and the time she went under this charter, or that there was any regular system employed by petitioner with reference to the proper upkeep of its vessels.

Sweet testified that a record was kept by petitioner of all of its boats going into drydock for repairs, and that he had not even looked up those records to see when *No. 32* had last been repaired (Sweet, 26). Although he was petitioner's Marine Superintendent, he did not know the age of *No. 32* (Sweet, 27). As an apparent afterthought, he said that he *had* made an effort to locate the records, but could not find them (Sweet, 28); and that he "imagined" that the scow was at the Jersey City Drydocks "within a year" before this casualty, "I should think about eight months" (Sweet, 29).

It appears quite clear that Judge WOOLSEY, who heard the case in the District Court, did not believe even Sweet's vague testimony concerning the upkeep of and repairs to the scow; for on the first day of the trial the Court warned the witness of the necessity of producing records of repairs from the drydocks. On Sweet's examination the following occurred:

> "The Court: Did you have the boat under repairs down at the Jersey City Drydock?
>
> The Witness: No, sir, at Hunts Point Drydock.
>
> The Court: Well, you can find out from there when it was done. *You had better get some information* on that *to show that she was repaired*" (Record, 29). (Italics ours.)

The trial of this case started on November 13, 1930. On the following day, November 14, it was adjourned to November 17. It was resumed on November 17 and was finally concluded on November 18 (Record, 1).

The Court warned the witness of the necessity of producing records of repairs on the first day of the trial. Thereafter, five days were available to petitioner to subpoena the records of any drydock which had done repair work on the barge. None was produced.

Sambraus, petitioner's Vice-President, testified on November 14, the second day of the trial, as follows:

> "Q. Have you endeavored to ascertain from the Jersey City or Hunts Point Drydock when this boat was in the drydock? A. No.
>
> Q. Made no endeavor at all? A. No, I haven't, for I have been unable to find out from our own records.
>
> The Court: He says he has been working on his own records very hard, and it apparently never occurred to him to go across the river and try to to get these from the drydocks" (Sambraus, 71).

Santos, the scow man, testified that he had been captain of *No. 32* for a year prior to this accident, and he did not remember the scow ever having gone to drydock (Santos, 64-65).

The whole question of the lack of privity or knowledge on the part of petitioner in the condition of the scow, and of her history prior to this loss, was so evasively and secretively handled by petitioner that there is very little wonder that the District Judge said:

> "It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind.

"The records of this particular scow perhaps may have been lost as is claimed during the moving of her owner from one office to another, but her owner's officers knew very well where all her repairs had been made and they did not call anyone from the repair yards to testify in regard to her" (Opinion, 122).

In *Sanborn* v. *Wright*, 171 Fed. 449 (1909), affd. (CCA 2) 179 Fed. 1021, a boat sank and lost her cargo without any apparent cause. The boat was found to have been unseaworthy and her owner was denied the right to limit liability upon the ground that the responsible agent of the owner had failed to conduct a proper inspection of the boat before she was put into service. The Court said:

"It is urged that the respondent if liable by reason of the condition of the vessels, is entitled to limit its liability to their value * * *. The determination of the question depends upon which of the respondent's officers or agents knew or should have known of the condition of the vessels and what he did to inform himself thereof. The president of the respondent was not able to testify to their condition because he did not keep himself familiar with it. He said that Mr. Mulvaney was general superintendent of such affairs and was expected to see that the boats were kept in good condition. There can be little doubt that Mulvaney was the one to whom the condition of the vessels should have been known. The Republic, 61 Fed. 109, 113, 9 C.C.A. 386. His testimony discloses that *he performed the duty of inspection in a very perfunctory manner.* He said in testifying about the Eagle that they did 'whatsoever had to be done; *if the boat leaked in the bottom we put her on the dock and tended to it; if she wasn't leaking we didn't spend any money.*' That is, it was left to the progress of decay to develop signs of weakness. * * * I can not regard such a method as a proper one in the performance of the duties of inspection, the burden of showing which was upon the vessel's owner. The Colima (D. C.) 82 Fed. 665, 679" (455).

The District Court in the instant case denied limitation of liability to petitioner upon the ground that the leaky condition of the scow could have been discovered by the petitioner if it had made a proper inspection of the vessel before putting her under charter. Judge Woolsey said:

> "I think such inspection of the Cullen #32 as was made before she was put on the charter and was lying light, drawing perhaps 18 inches to 2 feet of water, is not sufficient to satisfy the requirement of the situation.
>
> "It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind..
>
> * * * * * * * *
>
> "Apparently a report by the master of the scow of a leak found was the only basis of or the reason for any examination other than walking around inside the scow when she was light to see whether there was any leak in her bottom and whether her beams were intact.
>
> "In other words, the Cullen Fuel Company, Inc., was indulging in a procedure which may, perhaps, be conveniently called a hearsay inspection.
>
> * * * * * * * *
>
> "The owner of the scow was here in port; the possibility of frequent observation of the scow by it is shown. The fact is that the scow was almost continually available for examination. In such a situation I think that her owners cannot be deemed entitled to have maintained the burden of proof to limit its liability on the facts as shown here" (45 Fed. (2) 863; Record, 122-123).

The Circuit Court of Appeals considered it unnecessary to pass upon this holding with respect to the petitioner's privity or knowledge of the unseaworthy condition of the

scow, and based its decision on the breach by petitioner of its implied warranty of seaworthiness. In this connection Judge SWAN said:

> "In the court below limitation was denied upon the ground that the fault existed with the owner's privity or knowledge because no adequate examination of the scow was made before her delivery on charter. Since we follow The Loyal, the correctness of this ruling need not now be determined" (62 Fed. (2) 70; Record, 132).

Regardless of any question of law involved *as to* the right of a vessel owner to limit its liability for the breach of an implied warranty of seaworthiness, we respectfully submit that on the facts as found by the District Court petitioner was properly and correctly denied limitation of its liability.

In *The Calvert* (CCA 4) 51 Fed. (2) 494 (1931), the Court, in denying limitation of liability to a barge owner for damage caused by unseaworthiness of the barge, said:

> "If the inspecting officers did not know of the very bad condition in which the Calvert was before entering upon this trip, such ignorance was due to negligence in making their inspections, or in not making them at all. We agree with the District Court in its findings that the defendant company here is not entitled to limit its liability. It has not sustained the burden which the statute casts upon it before it can claim the benefit of this limitation" (498).

In the instant case, Sweet, the Marine Superintendent, was the one to whom the petitioner entrusted the duty of inspecting the scow. His own testimony shows that he was guilty of gross negligence in his "inspection" of the scow. He went down in the scow's hold and just "looked around" with a flashlight to see if any of her timbers were broken. The scow was not drawing more than two feet of water at

the time (Sweet, 19), and it is obvious that no leak above this light water line would have been visible under such an examination. With respect to the tightness of her seams, he was content to look down one side of the scow by standing on her deck and peering over her rail.

*In re Meyers Excursion & N. Co.*, 57 Fed. 240 (1893), affd. *The Republic* (CCA 2) 61 Fed. 109, a barge was hired to take a party on an excursion. In the course of the trip the barge encountered a severe wind storm, which lifted her hurricane deck and blew over the masts, killing several of the excursionists. The barge owner petitioned to limit its liability for the losses. The petition was dismissed. Judge BENEDICT said:

> "A proper examination of the vessel surely would have disclosed the unsound condition of the masts. * * * Such an examination would have disclosed the fact that the fastenings of the hurricane deck were insufficient. The petitioners *cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put"* (242-3). (Italics ours.)

Petitioner has quoted from the opinion of the Circuit Court of Appeals in that case (which affirmed the decree of the District Court) at pages 16-17 of its brief, but has omitted to quote the very pith of the decision. Immediately following petitioner's quotation, Judge WALLACE said:

> "A loss is not occasioned without the privity or knowledge of the shipowner, when it arises from his personal neglect to inform himself of the defective condition of his vessel, the vessel being under his immediate personal supervision" (61 Fed. 113).

Again, in *The Bessie, J.*, 268 Fed. 66 (1920), affd. (CCA 1) 276 Fed. 778, cert. den. 258 U. S. 620, the Court said:

> "There is no right to limit liability unless the vessel was seaworthy and reasonable care was exercised by the owner to see that she was properly manned, equipped and supplied" (67).

In *Braker* v. *Jarvis*, 166 Fed. 987 (1908), Judge ADAMS in the Southern District of New York, said:

> "It is well settled that the owner of a vessel is not entitled to limit his liability arising from the unseaworthiness of the vessel. If libelant (petitioner) was ignorant of the condition of the vessel, it was because of a negligent examination as in The Republic, 61 Fed. 109, 9 C.C.A. 386" (988).

The case of *Oregon* v. *Portland*, 162 Fed. 912 (1908) involved the question of the right to limit liability for the sinking of a barge due to unseaworthiness. The officers of the corporate owner testified that they had inspected the barge. The Court denied the petition to limit, saying:

> "No expert or other person was appointed or required by either the manager or superintendent of the lumber company (petitioner) to make a survey of the barge Monarch to determine with respect to her seaworthiness or fitness to undergo the service to which she was appointed under the demise; but these officers depended solely upon their own skill and ability for ascertainment of her condition" (921).

The cases discussed above are, we submit, directly in point with the instant case.

Sweet's examination was made when the scow was light, and drawing not more than two feet of water (Sweet, 19). Her sides were twelve feet high (Sweet, 17) and Sweet was looking for "leaks in her sides" or broken planks (Sweet,

22). It is quite obvious, we submit, that such an examination was altogether inadequate.

Petitioner says (Brief, p. 29):

> "In this case the evidence shows clearly and the Circuit Court of Appeals has held that the unseaworthiness * * * of the boat was without the privity or knowledge of her owner. It is said in the opinion as follows (p. 132):
>
> > "'In the case at bar the Cullen Company had no *actual* knowledge that she was in a leaky condition when sent out.'" (Italics ours.)

Petitioner's conclusion, we submit, is altogether unwarranted. No one has ever claimed that it had "actual knowledge" of the scow's unseaworthiness. But as we have shown in the above discussed cases, actual knowledge is not necessary. Petitioner having failed to use diligence to inform itself as to the unseaworthiness of the scow, is in privity or knowledge of the unseaworthy condition.

See also:

*The Malcolm Baxter, supra,* pages 35-36;
*Craig* v. *Continental,* 141 U. S. 638, 646, 12 Sup. Ct. 97;
*In re Jeremiah Smith* (CCA 2) 193 Fed. 395;
*Eastern* v. *Great Lakes* (CCA 1) 256 Fed. 497, 502;
*Erie Lighter No. 108,* 250 Fed. 490, 494;
*In re Reichert Towing Line* (CCA 2) 251 Fed. 214, 217, cert. den. 248 U. S. 565;
*In re P. Sanford Ross* (CCA 2) 204 Fed. 248, 250-251;
*Chesapeake* v. *Baltimore* (CCA 4) 40 Fed. (2) 394.

In *The Northern Belle,* 154 U. S. 571 (1870), Mr. Justice MILLER, delivering the opinion of this Court said:

> "It is the duty of the carrier who offers * * * barges for service to have them often examined and thoroughly inspected so as to be sure of their condition. He should not use a barge after she has become, from age, or decay, or injury, unfit for use, and should repair them often and well, so long as they can by repairing be safely used, and no longer.
>
> "For this the best interest of all parties requires that he shall be held rigidly responsible" (572).

When Sweet "looked over" the scow, he made no tests of any kind whatsoever, and was apparently quite content to rely on what he could see with his naked eye when the scow was drawing only about two feet, although he knew that the scow was about to go under charter, for the purpose of carrying valuable cargo (Pierce, 111). Nothing at all was done to test the oakum in the scow's sides for tightness, and Sweet's "examination" in that respect consisted of standing on the scow's deck and looking down the side of the scow which was away from the pier to which she was moored (Sweet, 218).

Captain Gardner, petitioner's witness who examined the scow after the accident, testified that the only way to tell whether the oakum in a scow's seams was tight was to test it with an instrument "something like an ice pick but a little flatter" and to "shove it along the oakum, not into the oakum, to see if the oakum is tight in the seams" (Gardner, 99). Apparently petitioner was much more diligent in examining the boat after the accident than before it.

Yet Sweet, when he "looked over" the scow, merely flashed his light around, looking for broken deck beams or broken side planks, and peered down the scow's outboard side by looking down from her deck.

With reference to the proper method of examining a vessel for seaworthiness, and the necessity for tests, this

Court, in the case of *The Edwin I. Morrison,* 153 U. S. 199 (1894), said:

> "* * * that tapping with a hammer * * * might have developed any insecurity, if there were any; that no such tests were applied; but that the caps and plates appeared all right to visual observation * * * that examination by the eye is such as reasonably prudent master or owner might be expected to give such coverings in order to determine their seaworthiness, does not give it that effect. *The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure*" (215). (Italics ours.)

In *Warner Sugar Ref. Co.* v. *Munson,* 23 Fed. (2) 194 (1927), the Court, in speaking of the necessity of tests to determine seaworthiness, said:

> "The only testimony as to the condition of the pipe at that time was that of the first officer, who testified that before taking on cargo he looked through all the holds and saw there was no leaks in the pipes; that he made no other tests or examinations. * * *"
>
> "If a vessel owner is satisfied to *rely on external appearances* that the vessel and her appliances are in such good order that it is safe to take cargo on board, *instead of making fair examinations and tests,* the vessel owner assumes the responsibility for such defects as may exist and *which a diligent examination would reveal*" (197). (Italics ours.)

In *The Southwark,* 191 U. S. 1 (1903), this Court said:

> "The burden was upon the owner to show by making *proper and reasonable tests* that the vessel was seaworthy" (15). (Italics ours.)

In *The Leerdam* (CCA 5) 17 Fed. (2) 586 (1927), the Court said:

> "The evidence in this case is wholly unsatisfactory, and is consistent with the inference that *no test whatever was made or undertaken*" (587). (Italics ours.)

In *The Charlton Hall,* 285 Fed. 640 (1922), the Court said:

> "The inspection made of the pipes * * * appears to have been for the most part visual only; *no adequate tests being made* by tapping of the hammer or by other known methods.
>
> * * * * * * * *
>
> *"Mere visual inspection* * * * *was insufficient"* (641-2). (Italics ours.)

In *The Annie,* 261 Fed. 797 (1919) affd. (CCA 4), 269 Fed. 793, Judge WADDILL dismissed a petition for limitation of liability, and granted claimants a full recovery, upon the ground that the vessel owner had not caused any "proper or efficient test, hydrostatic or otherwise," to be made, *after the vessel had undergone repairs.*

In the case at bar, admittedly no tests were made, and it was not shown that repairs had ever been made. The "inspection" was made by peering over the scow's side and glancing at her seams.

While some of the authorities above discussed involve inspection under a defense of the Harter Act, rather than of the Limited Liability Act, we nevertheless submit that a proper inspection is a proper inspection, whether it be under the Limited Liability Act or in any other case. Since the Courts require a proper inspection in order for a vessel owner to limit liability for losses due to unseaworthiness, and also require a similar inspection in order to escape liability under the Harter Act, it is submitted that Harter Act cases as to what is proper inspection are very material to a similar inquiry under the Limited Liability Act.

Petitioner will no doubt contend that Sweet's negligence in not adequately inspecting *No. 32* is not sufficient to defeat petitioner's right to limitation, because Sweet was not a "managing officer" of petitioner. Thus, petitioner says (Brief, p. 45), "Even if it be held that Sweet's inspection was negligent, without the knowledge of the owner, * * * Cullen would still be entitled to limit liability. * * *." But, as we have argued above, Sweet was petitioner's Marine Superintendent and was in charge of the upkeep of its boats, and the privity of an agent primarily interested in the management of a vessel is the privity of the owner.

In the following cases limitation of liability was denied because of the negligence of the owner's servant other than a "managing officer":

*In re P. Sanford Ross, Inc.* (CCA 2) 204 Fed. 248—negligence of petitioner's superintendent;

*Sanbern* v. *Wright,* 171 Fed. 449, affd. (CCA 2) 179 Fed. 1021—failure of superintendent to make proper inspection of an unseaworthy boat;

*In re Jeremiah Smith & Sons, Inc.* (CCA 2) 193 Fed. 395—neglect of managing agent of line at one of its terminal ports;

*Parsons* v. *Empire* (CCA 9) 111 Fed. 202, cert. den. 183 U. S. 699—knowledge of a local agent at St. Michaels, Alaska;

*Texas* v. *Parker* (CCA 5) 263 Fed. 864, cert. den. 253 U. S. 488—negligence of manager;

*The Bessie J,* 268 Fed. 66, affd. (CCA 1) 276 Fed. 778, cert. den. 258 U. S. 620—knowledge of fleet manager of negligent custom of masters;

*Erie Lighter No. 108,* 250 Fed. 490—superintendent of the marine department of a railroad company.

Petitioner furthermore contends that having appointed a competent employee in Sweet to make the inspection, it should not be deprived of limitation because of his negligence. But there is absolutely no evidence showing that Sweet was competent to inspect the scow for seaworthiness. All that the testimony shows is that he had "been around" scows since 1918, and become Marine Superintendent for petitioner in 1924, which was the year immediately preceding this loss, and that prior to 1924 he was an "office man" (Sweet, 24).

Does that prove him capable of determining the condition of the scow as to her seaworthiness? We respectfully submit that it does not.

He was not shown to have been a qualified surveyor, to have taken part in building, caulking or repairing scows or to have any knowledge whatsoever in connection with scows. He had never seen the *No. 32* when she was loaded (Sweet, 30) and obviously knew nothing as to how the scow carried her load.

Assuming that petitioner would be entitled to limitation if it had selected a *competent* employee to inspect the scow, this would have no application to the instant case, where the authority of the person conducting the examination made him a managing agent of the corporation, and where there is absolutely no evidence to show his competency, and the burden of proof in this respect was upon petitioner. *Magill* v. *Michigan* (CCA 9) 144 Fed. 788, cert. den. 203 U. S. 593.

Not only has petitioner failed to bear its burden of proving its lack of privity or knowledge in the scow's unseaworthy condition, but its failure to offer any of its records in evi-

dence or to account satisfactorily for its failure to do so, and its failure to call any of its four or five employees who, it claims, kept its scows in good repair above the water line (Sweet, 28), give rise to a definite presumption that had the records been produced or the employees called as witnesses their evidence would have been unfavorable to petitioner's case.

*Clifton* v. *United States,* 4 How. 242, 246;
*The Eastchester* (CCA 2) 20 Fed. (2) 357, 358;
*The New York,* 175 U. S. 187, 204; 20 S. Ct. 67, 44 L. Ed. 126;
*The Richmond,* 275 Fed. 970;
*The Georgetown,* 135 Fed. 854;
*The Bombay,* 46 Fed. 665;
*Consolidated* v. *Knickerbocker,* 200 Fed. 840.

The unseaworthiness of the *Cullen No. 32* having been within the privity and knowledge of petitioner because of the negligence of its Marine Superintendent, it is respectfully submitted that petitioner was not entitled to limitation and that the petition was properly dismissed by the District Court and by the Circuit Court of Appeals.

**Resumé.**

It is respectfully submitted that the Decrees of the Circuit Court of Appeals and of the District Court should be affirmed for the following reasons:

*First,* the warranty of seaworthiness which the law affirmatively implies in every such contract was admittedly breached by petitioner; there is no valid ground for a distinction between an express warranty and an implied warranty in such cases, and this Court established the rule that the breach of an implied warranty of seaworthiness will de-

feat limitation in *Capitol Transportation Co.* v. *Cambria Steel Co., supra,* pages 21-23;

*Second,* respondent was demise charterer of the scow and bailee of her cargo at the time of the loss, and its right to maintain a suit to recover the cargo loss as bailee thereof, for breach of the warranty of seaworthiness, was declared by this Court in *Pendleton* v. *Benner Line, supra,* pages 32-33;

*Third,* Even if this Court be of opinion that breach of an implied warranty of seaworthiness will not of itself defeat the right to limitation of liability, nevertheless petitioner failed to show that the unseaworthy condition of the scow was without its privity or knowledge because (1) it failed to make a full and frank disclosure of the prior history of the scow, (2) it failed to prove the scow's age or when she had last been drydocked or in any manner repaired, and such failure not only defeats its claim of lack of privity or knowledge in the unseaworthy condition of the scow, but creates a definite presumption that any attempt to make such proof would have been harmful to petitioner's case, (3) its Marine Superintendent made a most cursory and casual "examination" of the scow, looking with a flashlight at her "upper beams" and to see "if she had any planks broken," (4) its Marine Superintendent was not shown to have been a competent person or to have had any adequate knowledge of the proper manner of inspecting a scow for seaworthiness, and (5) although petitioner's own witness Gardner explained the proper manner of testing seams for tightness of oakum, the Superintendent made no tests and was content "to rely on external appearances * * * instead of making fair examinations and tests" (*Warner Sugar Ref. Co.* v. *Munson, supra*).

## IV.

**The decrees should be affirmed, with costs.**

Respectfully submitted,

FORREST E. SINGLE,
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THOMAS H. MIDDLETON,
*on the Brief.*